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No. 06-462

Supreme Court, U.S.
FILED
DEC 1 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF TEXAS, the TEXAS DEPARTMENT OF TRANSPORTATION, and MICHAEL W. BEHRENS, in his official capacity as Executive Director of the Texas Department of Transportation,

Petitioners,

v.

MARJORIE MEYERS by her next friend EDGAR C. BENZING, HELEN ELKIN, RUTH H. DAVIS, and PHILLIP GREENBERG, on behalf of themselves and all others similarly situated, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, 27 OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

When a State removes a case from state court to federal court, does it waive its sovereign immunity for all claims against it?

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INTEREST OF AMICI

The States' interest is clear – "[a]n integral component of that 'residuary and inviolable sovereignty' retained by the States is their immunity from private suits." *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002). *See also THE FEDERALIST No. 39,* at 213 (James Madison) ("[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); *THE FEDERALIST No. 81*, at 455 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*") (emphasis original). This immunity, which is confirmed by the Eleventh Amendment, U.S. Const. amend. XI, protects the States from suit altogether unless one of the narrow exceptions applies. *See Green v. Mansour,* 474 U.S. 64, 68 (1985). Sovereign immunity does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), but precludes "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted). Indeed, sovereign immunity bars suits against the States by Indian Tribes, *Blatchford v. Native Vill. of Noatak,* 501 U.S. 773, 782 (1991), foreign nations, *Principality of Monaco v. Mississippi,* 292 U.S. 313, 330-32 (1934), and corporations created by the National Government, *Smith v. Reeves*, 178 U.S. 436, 446, 449 (1900). Moreover, it applies to proceedings in state court, *Alden v. Maine*, 527 U.S. 706, 712 (1999), federal administrative

proceedings, *Federal Mar. Comm'n*, 535 U.S. at 760, in admiralty, *In re New York*, 256 U.S. 490, 503 (1921), and in situations where the State's treasury is not implicated. *See Regents of the Univ. of California v. Doe*, 519 U.S. 425, 431 (1997). Thus, the States have an interest in this Court's review of any decision that undermines "the sovereign immunity enjoyed by States as part of our constitutional framework." *Federal Mar. Comm'n*, 535 U.S. at 753.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons. First, the States need guidance from this Court and resolution of a conflict among the Circuits. The States need guidance on the effects of invoking the jurisdiction of the federal courts. If, as the Fifth Circuit found, removal results an absolute waiver of the State's sovereign immunity from suit, then there will be enormous practical consequences. The States also need this Court to resolve a deep and mature conflict among the Circuits. If the States are to make informed decisions regarding removal, there must be uniform national rule.

Second, the lower court's decision contradicts this Court's pronouncements concerning the effect of a State invoking the jurisdiction of a federal court. As this Court's decisions suggest, when a State invokes the jurisdiction of a federal court, it does not waive sovereign immunity for all claims, but merely diminishes sovereign immunity to a limited degree. A State's decision to remove to federal court results in the loss of its "forum immunity" for federal courts. The State's sovereign immunity is neither greater

nor lesser than it would be if the State had chosen to remain in state court.

Third, the court of appeals' decision contradicts this Court's jurisprudence. This Court's decisions mandate that the exceptions to sovereign immunity, particularly the waiver exception, be construed narrowly. The Fifth Circuit's broad absolute approach cannot be squared with this Court's precedents. Additionally, the clear statement principle applies any time Congress attempts to regulate the States' sovereignty. Nevertheless, the lower court effectively held that a statute, which makes no mention of sovereign immunity, requires the States to shed the entirety of their sovereign immunity as a condition of vindicating their interests in federal court.

I. THE STATES NEED GUIDANCE FROM THIS COURT AND RESOLUTION OF A CONFLICT AMONG THE CIRCUITS.

The States need guidance from this Court on the effects of invoking the jurisdiction of the federal courts. According to the Fifth Circuit, a State's removal of an action from state court to federal court resulted in an absolute waiver of the State's sovereign immunity from suit. If this is correct, then the States are treated far worse than non-sovereign parties. The States must surrender their immunity as the price of litigating in federal courts, but non-sovereigns forfeit nothing. Of course, from a practical standpoint, the lower court's rule will discourage States from utilizing federal courts to resolve federal questions. Similarly, because all defendants must consent to removal, *Chicago, R.I. & P. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900), the States will be reluctant to consent to a non-sovereign co-defendant's desire to remove. In many

instances, these non-sovereign co-defendants will be the State's own employees who are sued in their personal capacities and who may have a right of indemnification under state law. This Court needs to address whether the Fifth Circuit's draconian rule of absolute waiver is the constitutional norm.

Moreover, the States need to have this Court resolve a deep and mature conflict among the Circuits concerning an issue that has enormous consequences for the States. In the Fourth, Seventh, and District of Columbia Circuits, States that remove an action to federal court only diminish their sovereign immunity to the extent that sovereign immunity has been waived in state court. *See Stewart v. North Carolina*, 393 F.3d 484, 488-90 (4th Cir. 2005); *Omosegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002). In sharp contrast, in the Fifth, Ninth, and Tenth Circuits, States that remove an action to federal court waive sovereign immunity for all claims. *See Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 242-50 (5th Cir. 2005); *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004); *Estes v. Wyoming Dep't of Transp.*, 302 F.3d 1200, 1203-06 (10th Cir. 2002). Consequently, States that are sued in the Fourth, Seventh, and District of Columbia Circuits are treated differently and more favorably than States that are sued in the Fifth, Ninth, and Tenth Circuits. Moreover, States that are sued in the First, Second, Third, Sixth, Eighth, or Eleventh Circuits have no idea whether removal has the effect of merely diminishing sovereign immunity to the level that existed in state court or absolutely waiving sovereign immunity for all claims. For the States to make informed decisions regarding removal, it is essential that this Court resolve the conflict among the Circuits.

II. WHEN A STATE INVOKES THE JURISDICTION OF A FEDERAL COURT, IT DOES NOT WAIVE SOVEREIGN IMMUNITY, BUT MERELY DIMINISHES IT.

On occasion, this Court has described a State's decision to invoke federal court jurisdiction as a "waiver" of sovereign immunity. *See Gardner v. New Jersey,* 329 U.S. 565, 573-74 (1947) (When a State files a proof of claim in a bankruptcy proceeding, the State "waives any immunity . . . respecting the adjudication of the claim."). The use of the term "waiver" can be misleading. Sovereign immunity is immunity from suit by another party. As such, it does not come into play when the State invokes the jurisdiction of a federal court. To the contrary, the initiation of litigation or removal of a case to federal court involves a wholly separate power – the voluntary right of a State to invoke the jurisdiction of a federal court to protect the States' legal interests. Karen Cordry, *Seminole Seven Years On, in* ANNUAL SURVEY OF BANKRUPTCY LAW 2002-03 383, 455 (William L. Norton ed., 2003); Dan Schweitzer, *Lapides v. Board of Regents of the University of Georgia System: A Partial Answer to the Sovereign Immunity-Waiver Conundrum,* 17 Nat'l Envir. L.J. 3 (Dec. 2002/Jan. 2003).

Therefore, a State's decision to invoke federal court jurisdiction is properly characterized as a "diminishment" of sovereign immunity. This Court's decisions implicitly demonstrate the point. When a sovereign entity initiates suit in federal court, it exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian*

Tribe, 498 U.S. 505, 509 (1991);[1] *United States v. United States Fid. & Guar. Co.,* 309 U.S. 506, 511-12 (1940); *United States v. Shaw,* 309 U.S. 495, 501-02 (1940).[2] Thus, if the sovereign entity seeks injunctive relief, sovereign immunity bars a counterclaim or cross-claim for damages. *Potawatomi Indian Tribe*, 498 U.S. at 509; *United States Fid. & Guar. Co.*, 309 U.S. at 513. If a sovereign seeks monetary damages, any counterclaim seeking an amount of damages greater than the amount originally sought by the sovereign, even with respect to a mandatory counterclaim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. In other words, the initiation of litigation does not result in an absolute waiver of sovereign immunity. *See Potawatomi Tribe*, 498 U.S. at 509.

Similarly, if a State invokes the jurisdiction of a federal bankruptcy court by filing a proof of claim, sovereign immunity is not waived, but merely diminished.[3]

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[1] While *Potawatomi Indian Tribe* involved a suit initiated by an Indian Tribe rather than a State, the same principles apply to the States. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (tribal immunity akin to that of other governments until abrogated).

[2] Although *United States Fid. & Guar. Co.* and *Shaw* involved suits initiated by the National Government rather than a State, "it cannot be doubted that the question whether a . . . suit is one against the State . . . must depend upon the same principles that determine whether a . . . suit is one against the United States." *Tindal v. Wesley*, 167 U.S. 204, 213 (1897). *See also California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) ("In considering whether the Eleventh Amendment applies . . . , this Court's decisions in cases involving the sovereign immunity of the Federal Government . . . provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government.").

[3] Indeed, two Circuits interpreting the Bankruptcy Act, the predecessor to the current Bankruptcy Code, held that any "waiver" resulting from a proof of claim was limited to the amount of the proof of claim. *See Jones v. Yorke (In re Friendship Med. Ctr., Ltd.)*, 710 F.2d

(Continued on following page)

"When the State becomes the actor and files a claim against the fund it waives any *immunity which it otherwise might have had respecting the adjudication of the claim.*" *Gardner*, 329 U.S. at 574 (emphasis added). Put another way, "if a state files a proof of claim, it waives immunity from any actions that are the equivalent of a compulsory counterclaim." Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 Tex. L. Rev. 1381, 1401 (2003). In sum, a State's filing of a proof of claim merely allows the adjudication of *that* claim. *Gardner*, 329 U.S. at 574.

Thus, a State's decision to remove a case to federal court cannot be regarded as a waiver of sovereign immunity for all claims. *See Stewart*, 393 F.3d at 488-90. Rather, the act of removal merely diminishes sovereign immunity for "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides v. Board of Regents of the University of Georgia System*, 535 U.S. 613, 617 (2002). In other words, a State's decision to remove results in the loss of its "forum immunity" for federal courts. The State's sovereign immunity is neither greater nor lesser than it would be if the State had chosen to remain in state court.

Because the Fifth Circuit held that a State's decision to remove a suit to federal court results in a waiver of sovereign immunity for all claims, it misapprehended this Court's jurisprudence on the effect of a State invoking the jurisdiction of a federal court. That misapprehension and

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1297, 1301 (7th Cir. 1983); *Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2*, 694 F.2d 449, 462 (6th Cir. 1982).

the need for further clarification by this Court warrants review. Certiorari should be granted.

III. THE LOWER COURT'S DECISION CONTRADICTS THIS COURT'S JURISPRUDENCE.

The lower court's decision also contradicts this Court's jurisprudence in two ways. First, the Fifth Circuit's absolute waiver rule is inconsistent with the narrow scope of the exceptions to sovereign immunity. Second, the court of appeals pronouncement that removal equals absolute waiver is inconsistent with the clear statement rule.

A. The Exceptions to Sovereign Immunity Are Narrow.

Although the scope of sovereign immunity is quite broad, *Federal Mar. Comm'n*, 535 U.S. at 760, the scope of the exceptions to sovereign immunity is quite narrow. For example, Congress, exercising its power to enforce the Fourteenth Amendment, U.S. Const. amend. XIV, § 5, may abrogate sovereign immunity for federal statutory claims that involve a constitutional violation. *See United States v. Georgia*, 126 S. Ct. 877, 881 (2006); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (both finding abrogation for federal statutory claims that involve a constitutional violation). Yet, when a federal statutory claim does not involve a constitutional violation, abrogation has been rejected. *See generally Board of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000); *Alden*, 527 U.S. at 748; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (all holding that the States were immune

from statutory claims that did not involve constitutional violations). *But see Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (finding abrogation for a federal statutory claim that did not involve a constitutional violation, but did involve gender discrimination). Similarly, although the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), generally allows federal courts to enjoin state officers, in their official capacities, to conform their conduct to federal law, *Frew v. Hawkins*, 540 U.S. 431, 440 (2004), the doctrine is inapplicable where Congress had enacted a "detailed remedial scheme," *Seminole Tribe*, 517 U.S. at 71-75, or where "special sovereignty interests" are involved. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997).

More significantly for this Petition, while the States may voluntarily waive sovereign immunity, *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999), a waiver of sovereign immunity will be found "only where stated 'by the most expressive language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation omitted). Indeed, there are no constructive waivers of sovereign immunity. *College Sav. Bank*, 527 U.S. at 681-84. *See also United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). Thus, a State does not waive its sovereign immunity in federal court by consenting to suit in its own courts, *Smith*, 178 U.S. at 441-45, stating its intention to "sue and be sued," *Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (*per*

curiam), or authorizing suits against it "in any court of competent jurisdiction." *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946). "Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment ... [absent] intention to subject itself to suit in federal court." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (citations omitted). Consequently, receipt of federal funds, general participation in a federal program, or an agreement to recognize and abide by federal laws, regulations, and guidelines alone are insufficient to waive sovereign immunity. *See id.* at 246-47.

In sharp contrast to this Court's narrow construction of sovereign immunity exceptions, the lower court adopted a categorical absolutist approach to waiver. Although "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign," *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), the lower court found that the mere act of removal results in the implicit waiver of sovereign immunity for *all* claims. Moreover, the court of appeals rule – that States must sacrifice sovereign immunity if they wish to litigate in federal court – raises serious constitutional difficulties. *See College Savings Bank*, 527 U.S. at 687 ("In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

B. The Lower Court Decision Contradicts the Clear Statement Principle.

The process for removing a case from state court to federal court is governed by 28 U.S.C. § 1446. *See* Charles Alan Wright & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: FEDERAL PRACTICE DESKBOOK § 42 (2002). By holding that a State waives sovereign immunity for all claims when it removes a case, the Fifth Circuit effectively held that the 28 U.S.C. § 1446 *requires* the States to surrender their immunity as a condition of choosing to have the case heard in federal court. Such an interpretation of a federal statute contradicts the clear statement principle.

To explain, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1990) (internal quotation marks omitted). "[T]he clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 544 (2002). This principle "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass,* 404 U.S. 336, 349 (1971). If Congress is not clear and unambiguous, there can be no abrogation or waiver of the States' sovereign immunity. *See Dellmuth v. Muth,* 491 U.S. 223, 230-32 (1989) (finding that Congress did not clearly express its intention to abrogate). *See also Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765,

787 (2000) (Because Congress did not clearly and unambiguously state that a State was a "person" under the False Claims Act, a *qui tam* relator could not bring suit on behalf of the United States against a State.).

If the clear statement principle is applied to the act of removing a case to federal court, then there is no waiver of sovereign immunity. The removal statute, 28 U.S.C. § 1446, does not mention the Eleventh Amendment, sovereign immunity, or the States. *See Dellmuth*, 491 U.S. at 231 (Federal statute that does mention the Eleventh Amendment or the States' sovereign immunity does not abrogate sovereign immunity). This omission is not surprising. The purpose of the removal statute is not to regulate the States' sovereign immunity, but "to protect federal rights and to provide a forum that could more accurately interpret federal law." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247 n.13 (1970).

Because the Fifth Circuit gave a broad construction to an exception to sovereign immunity and because it ignored the clear statement principle, the decision below contradicts this Court's decisions. Certiorari should be granted.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

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December 1, 2006